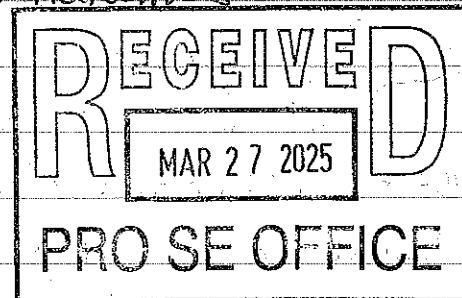


Mr. Robert Flemming  
Attorney of Record  
Founder and Director for Legal Literacy Advocates  
Five Points Core LLC  
6600 State Route 96  
Romulus, N.Y. 19541



Attn: CLERK OF COURT  
Southern District of New York Second Circuit  
Daniel Patrick Moynihan  
United States Courthouse  
500 Pearl Street  
New York, N.Y. 10007

Attn: Corporation Counsel  
100 church street  
New York, N.Y. 10007

January 31, 2025

RE: Robert Flemming v. Set. Stratford #34209 Set. Bittman #930510 Civ 3345  
CPLR 2221(d)(5)

Motion for NEW trial Pursuant to Rule 59

Although Mr. Robert Fleming, Attorney of Record is highly appreciative of Hon. Totillo, acknowledging via 1/23/2025 notice to the Defendants of Mr. Fleming's motion for a new trial, Mr. Fleming, however, is appalled at how Hon. Totillo stated that:

- a. the court does not require additional briefings on this motion;
- b. Defendants need not respond; and
- c. Should the court determine that additional briefings would be useful, it will promptly reach out to the parties.

Acknowledging Federal Rule of Civil Procedure 59 gives a court discretion to grant new trial on all or some of the issues in a case after a jury trial has been held for any reason for which a new trial has or may therefore be granted in its discretion at law in Federal court. Fed. R. Civ. P. 59(a)(1)(A).

### EXAMPLE

The court abused its discretion when granting Defendants' application to preclude inquiry into Defendants' disciplinary histories, while knowing or should have known that:

- 1. the Bronx District Attorney's offices release of their heavily redacted list of cops who had been subjects of "adverse credibility findings," like Det. S. Stradford's to Braccini, could not only aid with understanding (his/her) criminal prosecutions but would have provided the jury with adequate evidence to review the allegations of official misconduct against Det. S. Stradford to Braccini fairly and how, why and when the civil complaints and allegations of perjury specific to them (and other officers) bore on Det. S. Stradford to Braccini's credibility at the trial; see People v. Conner, 184 A.D.3d 431 (2020), *City of New York v. City of New York*, 33 Misc. 3d 1246(A) (9/13/2011). Acknowledging how, on 1/126/2014 Hon. Justice A. Torres ruled while relying upon

Mr. Robert F. Fleming  
Attorney of Record  
Founder and Director for Legal Literacy Advocates  
7175 Points Corners Place  
6600 State Route 96  
Romulus, NY 14541

Attn: Clerk of Court  
Southern District of New York  
Second Circuit  
Daniel Patrick Moynihan  
United States Courthouse  
500 Pearl Street  
New York, NY 10007

Attn: Corporate Counsel  
100 Church Street  
New York, NY 10007

3/7/2025

RE: Robert F. Fleming v. Defendants Ford #3420, Plaintiff Braccini #130540-cv-3345 (RPE)  
Cross Letter  
Motion for New Trial  
Pursuant to Rule 59(e) CP/R 2221(d)(5)(E)

Although Plaintiff, Mr. Robert Flemming, Attorney of Record is highly appreciative for those Katherine P. Ebeling, Esq. et al. informing the Defendant's of Mr. Flemming's anticipation for a rescheduled trial hearing and date, forthwith.

Mr. Flemming, Attorney of Record cautions the Plaintiff to be advised of Representative - Corporation Counsel, primarily Mr. Daniel Staver, who had engaged in the scheduled 2013 stipulation of settlement, for an insignificant, insulting, demeaning and belittling offer of Two Thousand Five Hundred (\$2,500.00) dollars, while knowing or should have known that if a prosecutor or police, on 2/27/2001 knowing and deliberately misleads the court or supplies false information, that on or about 2/27/1988 Plaintiff had raped, sodomized and committed a double homicide of his ex-girlfriend and her 9 year old daughter, with it previously being ruled as follows, during the 2013 pre-trial hearings:

Q. Detective, back in 2003, when the vaginal swabs came up through Casis matching the DNA of the defendant, how many matches were there?

A. Two.

Q. And who?

A. One for Stewart Cooper and one for Joe Little.

Q. And did you speak to anyone in the District Attorney's office about making an ATEST for a sex crime?

A. Yes I did.

Q. And what, if anything, were you told?

A. I was told that the statute of limitations had already been exceeded for rape. CPL § 30.10.

Which has lead to his 17(?) years of unlawful and illegal imprisonment, & is still Ford # 3720 % Det. Brading # 4305 % the state is liable for malicious prosecution see Conkey v. State, 14 Md. 1998 (1980).

II Respectfully yours,  
[Signature]

an analogous context of (SEE: WEINER v Bd. of Educ. of New York, 287 F.3d 138-146 (2nd Cir. 2002), while interpreting Plaintiff's complaint "to waive the (strongest arguments) that it suggests," the court constitutes Plaintiff's excessive force claim as a cause of action for damages for physical injuries suffered as a result of Stratford's alleged assault. Therefore, Plaintiff's protection against suggestive (i.e. identification or interrogation) procedures encompasses not only the right to avoid methods that suggest initial identification but, as well, the right to avoid, during the scheduled 1/21/2017 trial proceedings, having those suggestive methods risk violating Plaintiff's HIPPA rights, by permitting, aiding, letting, encouraging and inducing an informant environment for the disclosure of Plaintiff's medical diagnoses with Hon. Katherine P. Frilla to the defendant's (Def.'s Stratford #3420 to BRTC Civi #4305, et al.), knowing or should have known, that:

1. finding prisoners retain a right to privacy in medical information and that the right is "particularly strong" for HIV status. SEE: Doe v. City of New York, 15 F.3d 264-267 (2nd Cir. 1994) (i.e. individuals who are infected with HIV virus clearly possess a constitutional right to privacy regarding their condition); and
2. N.Y. Pub. Health Law § 278a (McKinley 2006), state agencies authorized to obtain confidential HIV-related information should have regulations to prevent discrimination, prohibit unauthorized disclosure, and establish criteria for determining who should receive the information and whether N.Y. Pub. Health Law § 278a(2)(A) (McKinley 2006), and
3. allowing prisoner to sue law enforcement (i.e. Def. Wendell Stratford #3420) in a separate suit for damages when he disclosed Plaintiff's HIV

medical status during the scheduled 1/21/2017 trial proceedings. SEE: Lipinski v. Shaw, 578 F. Supp. 131 (N.D. Ill. 1995), and

holding that prisoner-plaintiff stated proper claim for relief where, how and when accusing Det. Wendell Stratford #3420 of improperly revoking his HIV-related information. SEE: V v. State, 150 Misc.2d 156, 57-58 (Cir. Ct. 1991) "which, in and of themselves, how, fail[ed] to the court's transformed into a selection of ideological misconceptions that were tentative into one that is positively certified. U.S. C. & C. Const. Amend. 14.

### ASSESSMENT

Therefore, with Hon. T. Hill, et al., being considerate and thoughtful enough to make notice, how, as of 1/23/2025 Plaintiff has submitted his motion for a new trial, and how, at this time, the court does not require additional briefing on the motion, and as such, Defendants need not respond but should the court determine that additional briefing would be useful, it will promptly reach out to the parties.

Thus, while relying upon the analogous context of (SEE: Reehem v. Kelly, 257 F.3d 122 (2<sup>nd</sup> Cir. 2001)), and considering (all) of the state's arguments in support of Hon. Katherine P. Failla's decision for dismissing Plaintiff's Plausibly submitted and presented 2010 excessive force claim against Det. S. Stratford #3420, along with his separate suit against Det. Wendell Stratford #3420 for damage for (his) "deliberate indifference" and "intentional misconduct" without provocation, when he disclosed Plaintiff's medical status during the scheduled 1/21/2017 trial proceedings, and having found Hon. Failla's rulings, orders and judgments without merit.

The 2018 judgement dismissing Plaintiff's appeal must be reversed, with the matter being remanded for entry of judgement granting summary judgement, a

rescheduled settlement phone conference or a new trial within 120 days after the receipt of this motion and no more delay shall

Additionally, Plaintiff seeks damages based upon claims of FALSE ARREST, FALSE IMPRISONMENT, MALICIOUS PROSECUTION, INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS, NEGLIGENT HIRING, TRAINING, SUPERVISING, DETENTION AND VIOLATION OF HIS CIVIL AND CONSTITUTIONAL RIGHTS by DEF'S WENDELL STRATFORD #3420% BRATCINI #4305, individually and in their official capacities as police officers under (SEE: MORELL V. DEPT. OF SOCIAL SERVICES, 98 SCi 2018 (1978)) and

### RESPONSE TO SUPERIOR

Under the common law municipalities may be sued directly under §1983 for constitutional deprivations inflicted upon private individuals pursuant to a governmental custom, policy or practice, regulation or decision. SEE: BAPTIST V. RODRIGUEZ, 702 F.2d 593, 597 (2nd Cir. 1983) citing MORELL, SUPPORT AND

Furthermore, with respect of Plaintiff's initial, belated or present claims of failure to properly hire, train and supervise, defendants from 2010 thru 2017 have failed to or neglected to set forth any cause law to support their contentions that Mr. Robert Fleming, attorney of record, notices of claim were insufficient to put the city on notice of these claims. italics

The causes previously cited by the defendants were to require to specify a theory of liability pursued in the complaint. SEE: COLES V. STANCIK, 2004 U.S. Dist. LEXIS 28196 (E.D.N.Y. 3/7/2004), MEGURY V. CITY OF NEW YORK, 119 F.Supp.2d 232-255, 56 (E.D.N.Y. 2000), MARDEN V. BRONX MUN. HOSP., 172d 59 (1994), and

NEITHER THE RECORD NOR THE LAW is clear enough to justify the 2017 or 2018 dismissal of

Plaintiff's excessive force claim and the aftermath of his 7/3/2013 non-indictable prosecution, where the court had granted Plaintiff's Motion to suppress his statement during the conclusion of the (SEE: People v. Thawley, 15 N.Y.2d 72 (1965)) on the grounds that:

1. with regard to the 2008 statement, however, the court holds that it was obtained in violation of the "indelible right to counsel" and must be suppressed.

Example

### Indelible Right to Counsel Rule

- 1A. A defendant who is in custody on a criminal matter for which he/she is represented by counsel may not be interrogated in the absence of his/her attorney with respect to (that) matter or an unrelated matter (i.e. the rape, sodomy 1° or murder 2° or counts) unless he/she waives the right to counsel in the presence of his/her attorney. SEE: People v. Lopez, 16 N.Y.3d 375-377 (2011) citing People v. Rogers, 48 N.Y.2d 167 (1979).

Although Stratford credibly testified that he believed that defendant had already pleaded guilty and was sentenced in the unrelated drug matter he was wrong. Defendant was in custody on the open case, he was represented by counsel on that case, and he had not yet pleaded guilty or been sentenced when he made the statement at Piker's trial on 10/23/2008.

The court rejects the People's position that the statement should not be suppressed because defendant purportedly stated that he was representing himself during his plea allocution in the unrelated drug case, there was absolutely no evidence before this court to establish that counsel had been relieved on the other case and that defendant was in fact proceeding pro se.

In any event, despite Stratford's good faith and the absence of any evidence to suggest that he intentionally violated defendant's right to counsel, it is clear that the right to counsel (had) <sup>is</sup> indelibly attached and <sup>is</sup> <sup>now</sup>

Subsequent statement elicited in the absence of counsel must be suppressed. SEE: PEOPLE V. GONZALEZ, 75 NY2d 938-89 (1990) citing PEOPLE V. SAMUELS, 49 NY2d 218 (1980). It is

consequently, the Plaintiff's to the Plaintiff MARGARET HUNTER to the defendant's to New York Court of Appeals to Second Circuit to Appellate Division - First Department et al.

Deprivation of the Right to Counsel during  
Custodial Interrogation

2b. Broadly construing Plaintiff's present complaint, he alleges that Defendants deprived him of his inalienable right to counsel during the 10/23/2008 interrogation. SEE AM. COMPL. 4; SEE ALSO, PL. MEM. 2 ECF NO. 58.

3b. Plaintiff cannot, however, seek relief under § 1983 for this claim, but instead, the appropriate remedy for (his/her) claimed constitutional violation is <sup>a</sup> Exclusion of the evidence following a Huntley hearing, relief which the Plaintiff has already received and which is not appropriately sought pursuant to § 1983. SEE: BROWN V. MATTES, 2004 WL 1774328 (2004).

Standard of Review

A. Different legal standards govern a court's review of motions to dismiss made pursuant to Fed. R. Cir. Proc. 12(b)(1) and 12(b)(6). On a Motion to dismiss pursuant to Fed. R. Cir. Proc. 12(b)(1), it is a court's duty, <sup>to the Plaintiff et al.</sup> to resolve disputed jurisdictional facts. SEE: CHAPILL INFL. SUD v. M/T PAVEL BYBENKO, 991 F.2d 1012-19 (2nd Cir. 1983). It is

b. Failure of subject matter jurisdiction (i.e. People v. Harris, 6 NY2d 9 (1983)) v

(SEE: *People v Lopez*, 16 NY3d 375 (2011)) to articulate the subject matter of how, where and why New York's indelible right of Plaintiff-Appellant's 6th Amendment right to counsel had been amended or modified to detract from its predecessor that:

Discussion & conclusion of Law

As a general rule a criminal action begins with the filing of an accusatory instrument. *People v Blake*, 35 NY2d 331 (1974). The United States Supreme Court has held that upon the commencement of an adversary criminal proceeding, the defendant has a constitutional right to counsel. SEE: *Kirby v Illinois*, 92 S.Ct 1877 (1972) and

New York (City & State) has defined this right to counsel as an "indelible right" available to the defendant at any critical stage of the prosecution. *People v Settles*, 46 NY2d 154-65 (1978); and

The filing of an accusatory instrument also is generally held to be the point where the right to counsel attaches. SEE: *People v Strother*, 234 AD2d 571 (and Sept. 1996).

However, there are situations, like Plaintiff-Appellant was subjected to during the 10/23/2008 uncounseled interrogation, where he, in the absence of counsel, was not only coerced to write an incriminating statement that was ultimately suppressed for the aforesaid reasons by which the indelible right to counsel had attached but, he was also subjected to excessive force by Det. Stratford #3420, and to Det. Brattoni's #4305 part, his failure to intervene makes him liable as well. SEE: *Gomez v Toledo*, 100 S.Ct 1920 (1980).

Arguably, as fragmentedly presented by the Defendant's Accepted by Hon. Titillat and unjustifiably mischaracterized within this Court's 1/12/2015 with the trial court's 1/26/2014 belief reliance on (SEE: *People v Harris*, 61 NY2d 9 (1983)), which (specifically) references guilty plea being intelligently and voluntarily entered

and nothing concerning, regarding nor negating a defendant's 6<sup>th</sup> Amendment right to counsel, nor New York's indelible right to counsel rule (see: People v West 81 N.Y.2d 370 (1993) (citing Blockburger v U.S., 52 S.Ct. 180; Brown v Ohio, 97 S.Ct. 2221 (1977)), ruling that:

Although it is clear that the 6<sup>th</sup> Amendment right to counsel attaches only to charged offenses, we have recognized in other context that the definition of that "offense" is not necessarily limited to the four corners of a charging instrument. In Blockburger v U.S., 52 S.Ct. 180 (1932), we explained that where the same act or transaction constituted a violation of (two distinct provisions) (i.e. 6<sup>th</sup> Amendment right to counsel / w New York State right to indelible counsel), the test to be applied to determine whether there are two offenses or only one is whether each provision of (two distinct provisions) requires proof of a fact which the other does not, see: Blockburger, supra and

WE have since applied the Blockburger test to delineate the scope of the 5<sup>th</sup> Amendment's Double Jeopardy clause, which prevents multiple of successive prosecutions from the same offense. Brown, supra and

WE see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel. Accordingly, we hold that when the 6<sup>th</sup> Amendment right to counsel attaches, unlike the trial court's 9/26/2018 /w that it is, of the 2/22/2018 arbitrary, capricious, illegal, irrational and belief rulings, it does exempt offenses that, even if not formally charged, would be considered under the Blockburger test.

Motions for New Trial

Federal Rule Civil Procedure 59 gives a court discretion to set aside and grant a new trial on (all) or some of the issues (i.e. People v

Lopez, 16 NY3d 375 (2011) v People v Harris, 61 NY2d 9 (1983)) in that case after a jury trial has been held "for any reason for which a new trial should be granted, where - when - how and why. How closely to those findings of the trial knowinglly mislead, misguided and erroneously applied (see People v Harris, 61 NY2d 9 (1983)) to Plaintiff-Appellant's 1/20/2017 civil case and ruling, as well as to the trial court's 9/26/2014 decision while denying his CPL 440.10 motions for which a new trial must have therefore been granted in the actions at law in Federal Court. Fed. R. Cr. P. 59(a) (1)(A), i.e. A court may, for example, grant a new trial "if, as Plaintiff-Appellant has illustrated a prima facie case of "substantial errors being made within the 2013 pre-trial and trial court proceedings to the 2017 scheduled 1983 pre-trial and trial court proceedings, where substantial errors were (individually and collectively) made in admitting or excluding evidence and information, or in charging the jury. In re Virendi University SEC. Litig., 765 F. Supp. 2d, 573 (SDNY 2011); Graham v City of N.Y., 128 F. Supp. 3d 681, 709 (E.D.N.Y. 2015) ("erroneous or inadequate jury instructions, during the separate but distinct continuing 2013 and 2017 scheduled trial proceedings, may, as it does, constitute ground(s) for rescheduled trial (where illustrated errors have been proven to be prejudicial in light of the charge(s) as a whole, quoting Lopez v City of Syracuse, 670 F.3d 127, 12<sup>nd</sup> Cir. 2012).

### Civil Rights — — Immunity Defense

In determining whether a public official (i.e. Det. Striboff # 3420/B, Meeni # 4305) is entitled to qualified immunity, a two-step analysis is followed:

First: the defendant(s) must prove that (he/she) was acting within the scope of (his/her) discretionary authority at the time of the allegedly illegal 10/23/2008 conduct. U.S. C. A. Const. Amend. 14, add 1/21/2017 trial proceedings; and

In order for a right to be clearly established for purposes of deferring claim of qualified immunity, contours of the right must be sufficiently clear so that a

responsible official (i.e. Det's Stratford #3420 & Braccini #4305) would or should know and understand that what (he/she) was doing, on 10/23/2008 clearly violated Plaintiff - Appellant's Constitutional Rights. 42 U.S.C. § 1983 § and

WHERE THE LAW (6<sup>th</sup> AMENDMENT right to counsel) & NEW YORK'S inalienable right to counsel rule § that the governmental officials (i.e. Det's Stratford & Braccini) allegedly violated was clearly established, the immunity defense will fail because a reasonably competent public official should know the law governing (his/her) conduct. 42 U.S.C. § 1983 § and

Summarily, for Katherine P. Faillit & Howard M. Gitterman to clearly § Det's Stratford #3420 & Braccini #4305, et al., standard to be employed in determining whether an Act on 10/23/2008 by government officials (i.e. Det's Stratford #3420 & Braccini #4305) was fairly arbitrary in the substantive due process context, depends upon whether the challenged 10/23/2008 Act of violating the 6<sup>th</sup> Amendment / w NEW YORK'S inalienable right to counsel rule, occurred within the legislative or executive spheres, where executive action (i.e. immunity defense) is at issue, the cognizable level of executive abuse of power (i.e. Professional Courtesy) is that which shocks the conscience. U.S.C. Const. Amend. 14 § and

Furthermore, while the Court is being constrained to review and examine Plaintiff - Appellant's § 1983 claim for EXCESSIVE FORCE during the 10/23/2008 unconsented interrogation, which contributed to his 12/27/2009 postplea re-arrest for Rape 1<sup>o</sup>; Sodomy 1<sup>o</sup>; and Murder 2<sup>o</sup> 2 counts and of which he has since discovered that S.C. No. #0032 & IND. No. #00564/2009 do not constitute (any) CRIMES, fails to charge (any) CRIME and cannot be MERGED see People v. VANCE, 222 N.Y. 74 (1917); People v. BRONWICH, 200 N.Y. 385; People v. GEYER, 196 N.Y. 364 citing People v. FRANK, 88 App.D.V.R. 294 (1908) § and while relying upon the analogous context of (see: Johnson v. Suffolk County, 2021

WH 1163021 (3/26/2021) with the following facts that on 10/23/2008 during an uncounseled interrogation with Det. Stratford #3420 % BRACCINI #4305, when upon Plaintiff-Appellant refusing to answer questions, Det. Stratford #3420 assaulted him by knocking him upside the head SEVERAL times and BRACCINI #4305, for his part, failed to intervene, not being confronted by defendant(s) to Admissible Evidence are deemed Admitted. SEE: Giannullo v City of N.Y., 322 F.3d 139-40 (2nd Cir. 2003) (i.e. "if the opposing party . . . fails to controvert a fact set in the moving party's Rule 56.1 Statement, the aforementioned presented 2010 facts will be deemed admitted"; and

Similarly, stated, Two, and only two, Allegations are required to state of § 1983 cause of action:

1. Plaintiff must allege that some person(s) has deprived (him/her) of federal right (i.e. 8th Amendment) and
2. Plaintiff must allege that the person(s) who has deprived (his/her) of that right acted under color of state. SEE: Thucke v Menzillo, 112 A.2d 1737 (1997) and Pursuant to CPLR 14(2), culpable conduct is the affirmative defense that is to be pleaded and proved by the parties (i.e. Det. Stratford #3420 % BRACCINI #4305) asserting such a defense and upon Plaintiff's appropriate 2010 demand, defendant(s) were required to particularize their affirmative defense. SEE: Tonks v Huntington Hospital, 134 A.2d 465 (1987) and

Within Plaintiff's § 1983 EXCESSIVE FORCE claim for it (i.e. new trial, or phone conference for summary judgment, or settlement) discussions, Plaintiff defers (Exhibit A) pursuant to the attached copy of "New York State Confidentiality Law and NY, Public Health Law, Article 27-F, Det. Stratford knew or should have known, as a New York City Public Officer that: state law prohibits you from making any further disclosure of his information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law.

Any unauthorized further disclosure by Det. Stratford #3420, during the 2017 trial, in violation of state law, may, as it should, result in a fine or jail sentence of both. SEE:

TBT

SEE: *McKinlon v. Pafferson*, 568 F.2d 930, 934 (1977); *traffler v. Thompson*, 662 F.Supp. 945-946 (N.D. Ill. 1982) citing words v. white, 689 F.Supp. 874 (W.D. Wis. 1988) (i.e. therein it was found that the plaintiff, like Mr. Robert Fleming, attorney of record, stated a cause of action under § 1983 against Dr. Wendell Strickland #3420, who had, during the scheduled 1/21/2017 Federal trial with a "deliberate indifference" and "intentional misconduct, without provocation" disclosed to non-medical personnel and others viewing the proceedings, that (he/she) had tested positive for AIDS for which it has previously been held that Plaintiff, Mr. Robert Fleming, attorney of record has a constitutional right to privacy in (his/her) medical records. SEE: *Whitaker v. Roe*, 429 U.S. 587-598 (1977) citing *Sindell v. Abbott Laboratories*, 607 F.2d 924 (1980).

Accordingly, the reasoning contained within the precedents is eminently persuasive here and of this procedural point as well as in accordance therewith, the Honorable P. Faillit, et al., being encouraged to rule that this CPK 2021 (d)(e) motion for a new trial, rescheduled summary judgement or settlement conference hereby states a valid claim for the violation of Plaintiff's constitutional right to privacy and such right precluded Dr. Wendell Strickland #3420, on 1/21/2017 from disclosing to other non-medical personnel that he suffers from AIDS.

Clearly, the proponent of summary judgement or settlement conference or for a new trial must MAKE A prima facie showing of settlement as a matter of law, offering sufficient evidence to ELIMINATE any material issue of fact from the case. SEE: *Sillman v. NY 2d 395-404 (1957)*, and

Finally, in reviewing the motion papers, for which Hon. Faillit et al. have made notice of, as of 1/23/2025 that while Plaintiff supports his motion with the recitations of the alleged facts within (his/her) claims for

These Plaintiff's, unfair and partial misadvice to the Defendants that the court does not require additional briefing on this motion and as such, Defendants need not respond, whereby with the Defendants offering no contrary set of facts, and

With it being well-established that facts appearing in Plaintiff's papers which the Defendant's does not controvert are deemed admitted, see: *Kucharek v. Angel Bledsoe*, 36 A.D.3d 537-544; *Fifth v. State of New York*, 287 A.D.2d 771 A.P.D.98 N.Y.2d 365 (2002).

Therefore, due to the extenuating circumstances surrounding Plaintiff's unfairly supervised 1/2017 trial proceedings, where the Honorable Eric Park Plaintiff had presided, as well as the circumstances which were permitted to occur to where Plaintiff was prevented from prosecuting his/her undisputed and non-controverted claims adequately, the 2017 unfair order, ruling and judgement in favor of the Defendant's, must be reversed and a new trial order before a different judge, unless the Defendant's would rather engage in a rescheduled settlement or summary judgement video conference, like what ensued, on or about 11/23/2015 with the Daniel Stavridis, Esq. corporation counsel.

what constitutes profits of the crime

Plaintiff argues that the \$1 million demand/w interest does not constitute proceeds from the alleged 2/29/1988 crime but rather is compensation for a separate independent tort committed by Det. Stratford #3426/Botterini #1305, of which he is the victim in vicious prosecution where he received 9/26/2014 and 1/11/2014 motions, court transcripts, rulings and exhibits proves how, why and when the Bronx District Attorney's, ~~42nd~~ pdt. % cold case squad engaged in an unauthorized policy, with a "deliberate indifference" and "intentional misconduct" of knowingly and deliberately misleading the court by supplying false information (see SCI do. #00032/2009 % ins no. 20564/2008) which lead to (his/her) 16 1/2 years of false imprisonment, the officer's and state may both become liable for

malicious prosecutions. SEE: *Conkley v. State*, 74 A.D.2d 998 (1980). And acknowledging this court's previously ruled upon 11/26/2014 statement of how: "Since pro se civil rights complaints should be read with a generosity (plaintiff's original) complaint must be given the benefit of incorporation" (*Cantinello v. City of New York*, 624 F.Supp.1147 1148 (S.D.N.Y. 1986)). And

moreover, this court also considered the state court Brown's misreading ruling (i.e. *People v. Fattis*, 61 N.Y.2d 9 (1983)), where that court's indulgence, left with guilty pleas being intelligently and voluntarily entered, and nothing concerning, regarding not waiving defendant's 6<sup>th</sup> Amendment Right to Counsel or New York's inadmissible Right to Counsel Rule (SEE: *People v. Lopez*, 16 N.Y.3d 375 (2011)). And

however, when, at the conclusion of the Huntley Hearing, 15 N.Y.2d 72 (1965), the court granted Plaintiff's motion to suppress his statement at trial because he was in custody on Rikers Island and represented by an attorney at the time of the interrogation. SEE: *People v. Pasci*, 64 Misc. 2d 634 (2<sup>nd</sup> Dept. 5/11/1970), where the court ruled, as is applicable to Plaintiff's case, in sum and substance:

1. Det's Stratford #3420/Battewi #4305 would be constrained to conclude that they had no information or evidence and no reasonable grounds to believe that Mr. Fennone had committed any crime; and
2. They acted only on an inchoate and unparticularized suspicion or hunch, as the record shows; and
3. They would HAVE had no right to question Mr. Fennone under these circumstances, failing to confront him in custody and have him escorted for interrogation, even with his alleged consent; and

4 Relying upon the analogous content of (see *People v Albright*, 32 A.D.2d 878 (1969)), the Appellate Division, <sup>in</sup> its <sup>unanimous</sup> opinion, <sup>in</sup> as much as <sup>sets</sup> <sup>Stratford v</sup> <sup>Braccini</sup>, held no right, initially, to interrogate plaintiff, the ensuing <sup>but</sup> search (although <sup>it</sup> <sup>was</sup> <sup>presumptively</sup> with plaintiff's consent) was fatally infected and the fruits thereof should have been suppressed; and

5. <sup>Whenever</sup> <sup>def's</sup> <sup>Stratford v</sup> <sup>Braccini</sup>, <sup>et al</sup> exercises dominion and control over a person, that person is in custody despite any denials by the defendant, <sup>one is</sup> <sup>at</sup> <sup>where</sup> <sup>(he/she)</sup> has been deprived of <sup>(his/her)</sup> freedom of action in <sup>(any)</sup> significant way. So says *Miranda* (Sup. Ct. 86 S. Ct. p. 1612 (1966))

6. In this case, <sup>there's</sup> <sup>failt</sup> <sup>to</sup> <sup>clarify</sup>, in the unlawful detention of Plaintiff-Appellant, where a violation of the 4<sup>th</sup> Amendment, <sup>def's</sup> <sup>Braccini</sup> <sup>Stratford</sup> entered the compound of Rikers Island, as well as the Bronx Cm<sup>t</sup> <sup>etc.</sup> and continued through the facility during the time of Plaintiff's obtained coerced 10/23/2008 statement; and

Acknowledging, how, on 10/13/2008 the court is <sup>permitted</sup> on how it is constrained (*inter alia*) to consider the accused mental state on 10/13/2008 being that he had been arrested for CSC 3<sup>rd</sup> & CPS 3<sup>rd</sup> and was an active drug user and must consider his mental condition at the time of the 10/13/2008 interrogation in determining whether there had been an effective waiver of his constitutional rights. SEE *People v Drake*, 172 A.2d 626 (1964); *People v Davis*, 23 A.2d 863 (1965). Among other things, records from that court <sup>etc.</sup> should be available which show his mental condition at that time, on 10/13/2008. It is possible that medical personnel who then attended him might cast some light upon the problem for which the waiver should be remitted to both the Bronx Supreme Court & 2<sup>nd</sup> circuit, for a rescheduled trial, as to the effective and intelligent waiver of Plaintiff-Appellant which is the mitigating factor issue which pre-determines Plaintiff's excessive force claim; and This court, therefore, is constituted to agree that Plaintiff's 2/17/2007 postplea <sup>waist</sup>

wits, is held remittit without adequate probative cause, jurisdictional or sufficient evidence, where, during the scheduled 2013 pre-trial hearing the following information was revealed, that:

Q. Detective, back in 2003, when the vaginal swabs came up through DNA matching the DNA of the defendant, how many matches were there?

A. Two.

Q. And who?

A. One for Selina Cooper and one for Joe Little.

Q. And did you speak to anyone in the District Attorney's Office about nothing for a ~~test~~ for a sex crime?

A. Yes, I did.

Q. And what, if anything, were you told?

A. I was told that the statute of limitations had already been exceeded for rape. Then, within that statute's 27 months / the Reply - CPL § 330, so decisions to be timely submitted CPL § 330 motions, on pg. #2, it has been belatedly revealed how, for instance, defendant incorrectly argues that the indictment number in this case was somehow improperly "merged" with the unrelated Federal murder case, and

He also argues that the verdict was re-argument because he was acquitted of the rape and sodomy charges on which the felony murder charges were based. Then, belatedly admitting, which should have been revealed to the 2013 trial jurors, that: "due to the statute of limitations, however, defendant was never charged with any rape or sodomy counts in this case. SEE: People v. FLEMING, IND. No. #00564/2009 (10/15/2015) on pg. #2.

which does not fail will not foreclose appellate review from (i.e. Appellate Division - First Department to Southern District - 2nd circuit) that:

SCI No. #00532/2009, which charge the commission of a crime on 10/20/2008 of which was subsequent to the finding of the crime is evidently failing to

charge a crime, and cannot be amended; and

Indictment No. #00564/2009 which charge a crime(s) as having been committed subsequent to the finding of the same by grand jury on 2/15/2009 cannot be regarded as charging any crime; and

The omission to charge the commission of a crime as of a time prior to the finding of the indictment is one of substance, not of form; as such, the SCI No. #00032/2007 /#00564/2009 cannot be amended by the court (SEE: People v. Ybarra, 196 A.D.3d 745 (Ct. App. 12/14/1917); and

Further more, the Grand Jury did not charge Plaintiff with the commission of (any) crime at any time prior to the finding of the indictment, and such omission is not one of form but, of substance and the record in this case contains some inexplicable and contradictory details. Still, the question so far as the sufficiency of the indictment, the rulings of the (i.e. Court of Wyoming, Albany, Seneca, Washington and Bronx Supreme, County Court's) upon motions made to dismiss SCI No. #00032/2007 /#00564/2009 upon demurrer, and allowing an AMENDMENT to the Bkt. No. #2008B1058276 (all 10/3/2008), sufficiently appears to enable those court's, and now, this court, to rule upon the correctness of the proceedings had herein; and

on 10/20/2008, the Bronx County Court, however, sought by the AMENDMENT (i.e. SCI No. #00032/2007) of the 10/3/2008 Bkt. No. #2008B1058276, to make good an invalid Ind. No. #00564/2009, on 2/15/2009 and thus exercise the functions of the Grand Jury without legal proof that Plaintiff-Appellant had EVER committed a crime, or that he committed it crime on 10/21/2008, 1/13/2009, or 2/27/2009; such practice cannot be sustained (SEE: People v. Geyer, 196 A.D.3d 745 (2011))

while relying upon an analogous' context of (SEE: Ex parte Bating, 121 U.S. 1 (1887)), Mr. Fleming's case falls within the reasoning of the opinion of Ex parte Bating, 121 U.S. 1 (1887), where:

on 10/20/2008, the court sought to AMEND Bkt. No. #2008B1058276 V SCI No. #00032/2007 and on 2/15/2009 Ind. No. #00564/2009 as true bills against Plaintiff-Appellant

this court, after previously examining these claims, is constrained to review his arguments upon demurrer by ordering SCI No. 100032/2009 and TNS No. 1000564/2009 to be amended by striking out the words (i.e. Rape, Sodomy / and Murder 2<sup>o</sup> - 2 counts), as this court holds these words to be surplusage.

More than five years after Mr. Fleming was arraigned, he proceeded to trial and was convicted and

with Plaintiff's - Appellant's motion for a new trial pursuant to Rule 59; CPLR 2221(d)(e), he is eligible, as a citation to Hon. Phillip the Bronx District Attorney's Office, all of the assigned attorneys, including trial appellate, as well as the initially assigned pro bono lawyers, ineffective lawyer (i.e. Allison Webster, Bonds Gelby, Michael Beatrice, David Huang, Michael S. Kluger, Robert S. Debl for Center for Appellate Litigation, Claudia Tupper, Tom Hoth, Mr. and Mrs. Mark Zesko, Thomas Szvios).

for KAYE SOLER LLP, who knew or should have known, predicted upon the enclosed court transcripts, on 9/13/2013, pages 248 to 251, during the singer, Hayley Kiyoko's hearing of the following, in sum:

THE COURT: Mr. Kluger, do you anticipate putting any witnesses on?

Mr. Kluger: I don't have any witnesses in light of the fact that I understand that the court is going to take judicial notice of the file - I don't have the indictment number --

THE COURT: We will get it, 100032 of '09, pg. #248

THE COURT: People have rested on the hearing. Mr. Kluger, do you want to present any evidence by way of judicial notice or stip?

Mr. Kluger: Based on prior our conversation I think that we had and obviously, I haven't called any witnesses to prove out the fact that

MR. FLEMING was represented by counsel at the time of the 2008 interview but I would ask the Court to take judicial notice of the Court file, which is indictment number -- --  
The Court file is 00032 of '09.

MR. KLUGER: Yes.

THE COURT: It's an SCI number actually, p.g. #249

MR. KLUGER: I am asking the Court to take judicial notice of the fact that Mr. Fleming didn't actually plead guilty to that charge until January 12, 2009. It indicates that all over the file. Inside the file there is SCI paperwork that dated January 12, 2009. It's indicated on the Court's ticket, January 12, 2009, p.g. #250.

Therefore, it is a well-settled rule of law that the statute respecting amendments does not extend to indictments and that a defective (i.e. SCI No. 00032/2009, p. 249, 00032/2009) cannot be aided by a 7/31/2013 verdict of conviction, along with the 2017 Arbitrability, Apprehension, Illegality and Injunction judgment and verdict in favor of the defendant(s) in plaintiff's excessive force claim, and

that the claim, on 9/26/2014 in the erroneous denial of Plaintiff-appellant's 2015 40.10 motion, not relied upon the inaccurate application of *Giles v. People v. Harris* 61 N.Y.2d 9 (1983), which deals with a prior guilty plea being voluntarily and knowingly and that each prior conviction was constitutionally obtained.

All of which survives a motion to dismiss, as this motion to the initial 2010 motion contains sufficient particular matters that states a claim of relief that is plausibile on its face (i.e. *Ashcroft v. Iqbal* 556 U.S. 662 (2007)) where facts as per in Plaintiff's papers which the defendant's does not, for approximately 15 years does not read has not controverted, may be deemed Admitted (see AWA or STATE MISCELLANEOUS).

Respectfully submitted, *[Signature]*  
xx